

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
POINT RELIED ON	1
SUMMARY OF PREVIOUS BRIEFINGS	2
NUNC PRO TUNC PRINCIPLES SUPPORT USE OF AN ORDER	3
HERE REGARDLESS OF WHETHER SUCH AN ORDER HAS	
PREVIOUSLY BEEN USED FOR SUCH A PURPOSE	
THE FACTS FULLY ESTABLISH THAT MR. LYONS WAS	4
INCOMPETENT AT TIME OF TRIAL, THE STATE'S	
MISAPPREHENSION OF LAW AND FACT NOTWITHSTANDING	
THE STATE IGNORES OBVIOUS SHORTCOMINGS, AND	13
VIOLATIONS OF PROCEDURAL DUE PROCESS, WHICH	
PROHIBIT DEFERENCE TO THE TRIAL COURT'S	
COMPETENCY DETERMINATION	
CONCLUSION	20
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

<i>Carter v. Bowersox</i> , 265 F.3d 705 (8th Cir. 2001)	12
<i>Cooper v. Oklahoma</i> , 517 U.S. 348 (1996)	6
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	5

<i>Medina v. Singletary</i> , 59 F.3d 1095 (11th Cir. 1995) 7, 9,	12
<i>Middleton v. State</i> , 80 S.W.3d 799 (Mo.banc 2002)	12
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966)	5, 7, 9, 12, 13
<i>Reynolds v. Norris</i> , 86 F.3d 796 (8th Cir. 1996) 5, 7,	18
<i>Sena v. New Mexico State Prison</i> , 109 F.3d 652 (10th Cir. 1997)	7, 9, 12, 13
<i>Silverstein v. Henderson</i> , 706 F.2d 361 (2nd Cir. 1983) 7,	9,
<i>State v. Barnard</i> , 14 S.W.3d 264 (Mo.App.W.D. 2000)	12
<i>State v. Carroll</i> , 543 S.W.2d 48 (Mo.App. Spg. Dist. 1976)	3
<i>State v. Hampton</i> , 959 S.W.2d 444 (Mo.banc 1997)	14
<i>State v. Petty</i> , 856 S.W.2d 351 (Mo.App.S.D. 1993)	14
<i>State v. Wise</i> , 879 S.W.2d 494 (Mo.banc 1994)	14
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	12
<i>United States v. Nicholson</i> , 550 F.2d 502 (8th Cir. 1977)	3
<i>United States v. Renfro</i> , 825 F.2d 763 (3rd Cir. 1987) .	3

ii

APPELLANT'S REPLY BRIEF

POINT RELIED ON

The Trial Court erred in overruling Mr. Lyons' request for order nunc pro tunc for the purpose of setting aside Mr. Lyons' convictions and sentences in the above captioned cause due to Mr. Lyons having been mentally incompetent at time of his trial because said action of the Court violated Mr. Lyons' rights to enjoy due process of law and free from cruel and unusual punishment, in derogation of the 8th and 14th Amendments to the Constitution of the United States and Article I, Sections 10 and 21 of the Constitution of the State of Missouri in that

1. during Mr. Lyons trial, direct appeal, and Rule 29.15 proceedings, Mr. Lyons did not have the mental capability to understand the proceedings against him or to assist in his defense,
2. one means available to correct the error of suffering Mr. Lyons to proceed to trial while incompetent is through order *nunc pro tunc*, correcting that error regarding competence, and thereby nullifying the other proceedings, including

Mr. Lyons' convictions and sentences.

SUMMARY OF PREVIOUS BRIEFINGS

1. Summary of Appellant's Brief

In his Appellant's Brief, Mr. Lyons argued that the Trial Court erred in not exercising its inherent nunc pro tunc powers to correct the grievous miscarriage of justice wrought by Mr. Lyons being force to trial and appeal while mentally incompetent.

2. Summary of Respondent's Brief

In defending the Trial Court's decision not to grant Mr. Lyons' request for nunc pro tunc relief, the State initially argues that the Trial Court's nunc pro tunc powers are not broad enough to encompass the relief sought by Mr. Lyons, and thus that the Trial Court was correct in refusing the request. Respondent's Brief, p. 11-15, 24. The State goes on to argue, in the alternative, that even if this Court would find that the Trial Court had the power to grant the relief sought by Lyons, the Trial Court was still right in denying the request, reasoning essentially that Lyons had not been denied his rights protected by Constitutional due process provisions. Respondent's Brief, p. 15-25.

NUNC PRO TUNC PRINCIPLES SUPPORT USE OF AN ORDER HERE
REGARDLESS OF WHETHER SUCH AN ORDER HAS PREVIOUSLY BEEN
USED FOR SUCH A PURPOSE

Both the State and Mr. Lyons agree that Orders nunc pro tunc have classically been used to correct clerical errors in judgments. Appellant's Brief, p. 36-37; Respondent's Brief, p. 11-13. Both the State and Mr. Lyons agree that nunc pro tunc principles have been relied upon to revisit issues of a defendant's mental incompetency even after conviction and sentence against him have been pronounced. Appellant's Brief, p. 37-38; Respondent's Brief, p. 13-15; ***United States v. Nicholson***, 550 F.2d 502, 504 (8th Cir. 1977); ***United States v. Renfroe***, 825 F.2d 763, 767 (3rd Cir. 1987); ***State v. Carroll***, 543 S.W.2d 48, 51 (Mo.App. Spg. Dist. 1976).

Where the parties disagree is over whether these two sets of principles can merge into a novel form of relief for one who has been forced to trial while incompetent.

The State rightly argues that Missouri Courts have never before used the Order nunc pro tunc in this fashion, and has been resistant to expanding the scope

of the such a remedy. Respondent's Brief, p. 13-14. Counsel for Mr. Lyons argues that a quintessential issue, like a defendant's competency to stand trial, is a uniquely appropriate matter for a Trial Court to correct, as the Latin term describes, then as now, particularly in light of the way that such an issue has been treated in the cited cases. Appellant's Brief, p. 37-38. If this is an expansion of the use of the Order nunc pro tunc, it is an appropriate expansion under the law.

**THE FACTS FULLY ESTABLISH THAT MR. LYONS WAS INCOMPETENT
AT TIME OF TRIAL, THE STATE'S MISAPPREHENSION OF LAW AND
FACT NOTWITHSTANDING**

In its Respondent's Brief, the State accuses Lyons of misapprehending the applicable law and selectively and self-servingly accounting the facts. Respondent's Brief, p. 22. A fair review of the law and facts clearly show it is the State, and not Lyons, that has things wrong.

1. The State fails to account for the law related to the substantive due process aspect of the competency issue, concentrating strictly on the procedural due process

aspect of the matter

When a criminal defendant like Lyons challenges that he was not competent during criminal proceedings, two separate issues emerge: the first is the substantive due process question of whether he was in fact incompetent during the proceedings, the other is the procedural due process question of whether the lower court's process for determining competence was adequate. ***Pate v. Robinson***, 383 U.S. 375, 378 (1966); ***Drope v. Missouri***, 420 U.S. 162, 171-173 (1975); ***Reynolds v. Norris***, 86 F.3d 796, 799-800 (8th Cir. 1996).

In its brief, the State attempts to blur the line between the substantive and procedural due process parts of the competency issue by arguing the entire matter from a procedural due process point of view. Essentially, the State's contentions are that the process conducted by the Trial Court was adequate, that the determination of competence made by the Trial Court was a legitimate one based on the facts before the Trial Court at the time the determination was made, and that that factual determination should be unassailable due to the deference it is allegedly owed. Respondent's Brief,

p. 21-23. The State's notions are deficient in nearly every possible way. The State's notions are plainly incorrect where, as here, a substantive due process challenge is also raised.

The mental competence of a defendant is a *sine qua non* of the criminal justice process, because the placing on trial a person who is not competent amounts to plain error, resulting in manifest injustice or a miscarriage of justice. ***Pate v. Robinson***, 384; ***Cooper v. Oklahoma***, 517 U.S. 348, 354, fn. 4 (1996); ***Reynolds v Norris***, *supra*.

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. An erroneous determination of competence threatens a fundamental component of our criminal justice system-the basic fairness of the trial itself.

Reynolds v. Norris, *supra*, quoting ***Cooper v.***

Oklahoma, 353.

The substantive right to be tried while competent is a right which cannot be deemed waived. **Pate v.**

Robinson, supra; **Silverstein v. Henderson**, 706 F.2d 361, 367 (2nd Cir. 1983); **Sena v. New Mexico State Prison**, 109 F.3d 652, 654 (10th Cir. 1997); **Medina v. Singletary**, 59 F.3d 1095, 1111 (11th Cir. 1995).

At whatever stage in the proceedings a defendant challenges that his substantive right to trial while competent was abridged, he has the burden of proof regarding his incompetence by a preponderance of the evidence; however, since this is a question of ultimate truth, and not of procedural nicety, the defendant is not restricted to only those facts which were before the Trial Court, but may resort to all available, relevant facts to prove he was incompetent at time of trial.

Cooper v. Oklahoma, 355-368; **Pate v. Robinson**, supra; **Silverstein v. Henderson**, supra; **Sena v. New Mexico State Prison**, supra; **Medina v. Singletary**, supra.

2. The State's misapprehension of the law, and its witting or unwitting oversights, lead it to ignore the lion's share of the weighty evidence of Lyons'

incompetence

In its brief, the State accuses counsel for Mr. Lyons of "merely rehashing the evidence, purely from a defense point of view...." Respondent's Brief, p. 22. In truth, it is the State which is selective in its accounting of the facts.

The State's misapprehension of the law leads it to urge that this Court ignore some of the strongest evidence of Mr. Lyons' incompetence, the expert conclusions reached by Dr. John Wisner, M.D. after his comprehensive evaluation of Mr. Lyons and all of the records. L.F. 40-41; Respondent's Brief, p. 25. It is true enough that Dr. Wisner conducted his evaluation some five years after the time of trial. L.F. 40-41. Nevertheless, as noted already above, substantive due process principles require that this Court give serious consideration to all evidence of Mr. Lyons incompetence, including conclusions like those from Dr. Wisner, regardless of whether the Trial Court heard that evidence. ***Cooper v. Oklahoma***, 355-368; ***Pate v. Robinson***, *supra*; ***Silverstein v. Henderson***, *supra*; ***Sena v. New Mexico State Prison***, *supra*; ***Medina v. Singletary***,

supra.

Consideration also must be given to other strong evidence of Mr. Lyons' incompetence which the State, whether by design or oversight, completely fails to mention, particularly

- the expert opinion, rendered by Missouri Department of Mental Health Dr. Bruce Harry, M.D., in a letter to Trial Counsel on the eve of trial, that Mr. Lyons was incompetent to proceed to trial (L.F. 27-28), and
- the opinion by Trial Counsel that Mr. Lyons was not competent at time of trial (L.F. 30-31).

The State also soft-pedals or omits the strong evidence of Mr. Lyons incompetence which was plainly before the Trial Court at time of trial, including

- Mr. Lyons' long history of mental illness, including suicide attempts (Tr. 894-896, 923-977);
- Dr. Harry's original report finding Mr. Lyons incompetent to proceed to trial due to effects from Mr. Lyons' life-long mental illness (T.L.F. 353-362);

- Mr. Lyons' unquestioned incompetence and commitment to the State Hospital for better than two years (T.L.F. 2-7);
- the opinions by defense expert Dr. Phillip Johnson, Ph.D. that Mr. Lyons suffered from the chronic mental disease of delusional depression (2/23/95 Tr. 48, 70), that Mr. Lyons suffered with hallucinations (2/23/95 Tr. 60-61), and that Mr. Lyons was not competent to proceed to trial because he was not capable of assisting his counsel (2/23/95 Tr. 67).

And, the State fails to note the strong provisos placed upon the opinion of competence rendered by State psychologist, Dr. William Holcomb, Ph.D., including Holcomb's conclusions

- that Mr. Lyons suffered mental illness complete with delusions and hallucinations (2/23/95 Tr. 24, 27);
- that Mr. Lyons was only "minimally" competent (2/23/95 Tr. 27);
- that Mr. Lyons' minimal competence could be had only with proper medication (2/23/95 Tr. 6, 21);

and

- that Mr. Lyons should be hospitalized pending trial (2/23/95 Tr. 33-35).

It is significant that the State is never so bold as to venture that Lyons was actually competent at the time of his trial, but only hazards that the evidence, which it cites, support's a conclusion of competence.

Respondent's Brief, p. 15-21. That is certainly wise since the weight of all available evidence, including the opinions of two medical doctors, is that Lyons was incompetent at the time of his trial.

3. The law and the facts make this error plain, thus warranting relief, even in post-conviction proceedings

Relying upon its flawed notions about the law, and ignoring most of the facts, the State erroneously argues that direct appeal counsel cannot be faulted for not raising Mr. Lyons' incompetence on appeal. Respondent's Brief, p. 25.

Even Mr. Lyons' appellate counsel himself disagrees with the State, admitting his error (L.F. 33-34).

As already accounted above, and in Mr. Lyons' Appellant's Brief, the evidence of Mr. Lyons'

incompetence is strong, and thus the error of his being forced to trial is plain and obvious. **Cooper v. Oklahoma**, 355-368; **Pate v. Robinson**, supra; **Silverstein v. Henderson**, supra; **Sena v. New Mexico State Prison**, supra; **Medina v. Singletary**, supra. Since the error here was plain, this is an issue upon which Lyons clearly should have prevailed had it been brought on direct appeal, and Lyons' appellate counsel was prejudicially ineffective for failing to so raise the issue. **Strickland v. Washington**, 466 U.S. 668, 688 (1984); **Carter v. Bowersox**, 265 F.3d 705, 715-717 (8th Cir. 2001); **Middleton v. State**, 80 S.W.3d 799, 808 (Mo.banc 2002); **State v. Barnard**, 14 S.W.3d 264, 266-267 (Mo.App.W.D. 2000). Because Mr. Lyons was forced to trial while incompetent, this Court can and should rightly find that prejudicial ineffective appellate assistance occurred, and can and should, summarily, set aside Mr. Lyons' convictions, and order the matter remanded to the Trial Court for further proceedings. **Cooper v. Oklahoma**, 355-368; **Pate v. Robinson**, supra; **Silverstein v. Henderson**, supra; **Sena v. New Mexico State Prison**, supra; **Medina v. Singletary**, supra; **State**

v. Barnard, 267.

**THE STATE IGNORES OBVIOUS SHORTCOMINGS, AND VIOLATIONS
OF PROCEDURAL DUE PROCESS, WHICH PROHIBIT DEFERENCE TO
THE TRIAL COURT'S COMPETENCY DETERMINATION**

The State contends that the Trial Court's competency determination process tracked precisely the processes approved by this Court in other cases, and thus that that determination should be entitled to deference. Respondent's Brief, p. 21-23. The State is flatly wrong on the facts and on the law.

It has already been noted above that the Trial Court's determination suffers the fatal, substantive flaw that, in light of all of the facts now available, the determination of competence is clearly incorrect. And, to the extent that the State raises the excuse that, at time of trial, the Trial Court was somehow unaware of some of the facts which established Mr. Lyons' incompetence, the Trial Court itself, and the woefully inadequate process which the Trial Court employed for garnering facts, were to blame.

1. The Trial Court never engaged Mr. Lyons himself on the issues of competence, and thus never afforded itself

the opportunity to see Lyons' obvious mental deficiencies

In every case cited by the State in which the Appellate Courts of this State have upheld a Trial Court's finding regarding a defendant's mental competence, the Trial Court had itself supported its finding by engaging in an on-the-record interaction with the defendant during which the defendant specifically expressed his understanding of the proceedings and ability to assist with his defense. Respondent's Brief, p. 23-24; ***State v. Hampton***, 959 S.W.2d 444, 450 (Mo.banc 1997); ***State v. Wise***, 879 S.W.2d 494, 507 (Mo.banc 1994); ***State v. Petty***, 856 S.W.2d 351, 354 (Mo.App.S.D. 1993).

In this case, on the other hand, during the time prior to and during trial, the Trial Court never engaged Mr. Lyons in such an interaction, never so much as causing the Mr. Lyons to speak on the record before or during trial. Thus, the Trial Court never afforded itself an opportunity to assess Mr. Lyons ability, or more properly inability, to understand the proceedings and assist with his defense.

For many reasons, it is clear that, had the Trial Court engaged Mr. Lyons in such a fashion, Mr. Lyons' incompetence would have played out for the record. Foremost among those reasons is that such a demonstration of Mr. Lyons' incompetence actually did begin to occur at sentencing, when the Trial Court finally did inquire of Mr. Lyons whether Lyons' understood the proceedings against him, and Mr. Lyons responded simply and poignantly that he did not (Tr. 1039-1043). No further record than that was made because the Trial Court chose to end its inquiry with that initial exchange (Tr. 1039-1043).

2. The Trial Court made its competency determination a year before trial based upon a psychologist's conditional opinion of medicated competence, and then never followed up to find out that the conditions set by the psychologist were not met

There are additional deficiencies in the Trial Court's process here which negatively distinguish it from the proper processes previously upheld by this Court.

In this case, the only evidence in the record

supporting the Trial Court's finding of competence was the conditional opinion of competence offered by Dr. William Holcomb, Ph.D. better than a year before trial.

At that time, red flags of incompetence, already discussed above, were raised by Holcomb, to wit

- that Mr. Lyons suffered life-long mental illness complete with delusions and hallucinations (2/23/95 Tr. 24, 27);
- that Mr. Lyons was only "minimally" competent (2/23/95 Tr. 27);
- that Mr. Lyons' minimal competence could be had only with proper medication (2/23/95 Tr. 6, 21); and
- that Mr. Lyons needed to continue to be hospitalized pending trial (2/23/95 Tr. 33-35).

At the time the Trial Court made its finding of competence, better than a year before trial (T.L.F. 7), it perilously based its finding solely upon this highly conditioned opinion of medicated competence rendered by Holcomb. Since no record was ever made that Holcomb, a psychologist, was qualified to render such a medical opinion, it was at best highly questionable for the

Trial Court to base its competency determination, even at that time, upon such conditional opinions rendered by this non-medical doctor (T.L.F. 7). But even if the Trial Court's year-before-trial determination can be defended, the Trial Court cannot be defended for never revisiting the matter to inquire and determine whether the conditions set forth by Holcomb were ever met.

Of course, we now know that, had the Trial Court revisited the matter at time of trial, it would have learned that Mr. Lyons' then treating medical doctor, Psychiatrist Dr. Bruce Harry, M.D., believed Mr. Lyons to be incompetent (L.F. 27-28). We also know that, had a complete evaluation of Mr. Lyons' condition, like that conducted recently by Dr. Wisner, been ordered at time of trial, it would have been determined that the medications being administered to Mr. Lyons, while controlling Lyons' suicidal tendencies, actually profoundly exacerbated Lyons' inabilities to understand the proceedings and to assist with his defense (L.F. 40-41).

To the extent that the Trial Court did not have this necessary information about Mr. Lyons' incompetence, the

fault for that lies with the woefully inadequate competency determination process employed by the Trial Court. This process did not come anywhere close to comporting with the requirements of procedural due process. *Drope v. Missouri*, 181; *Reynolds v. Norris*, supra.

3. The State cannot shift the blame for the inadequacies of the Trial Court's processes

The State wrongly tries to shift blame for this fiasco from the Trial Court to the Trial Counsel. To effect this legerdemain, the State first posits that the Trial Court was not required to conduct a trial-time inquiry about competence unless Lyons' condition somehow changed from that at the time of the original competency determination. Respondent's Brief, p. 23-24. The State then claims that fault, if any, would consequently rest with Trial Counsel for not coming forward with any such change in Lyons' condition. Respondent's Brief, p. 24.

In making such an argument, the State once again totally ignores the substantive due process component of the competency issue.

But even if the questions here were solely upon

issues of procedural due process, the law and facts do not support these positions taken by the State.

The law of procedural due process required that the Trial Court's active vigilance, even *sua sponte*, throughout the proceedings. ***Drope v. Missouri***, 181; ***Reynolds v. Norris***, *supra*.

The facts already before the Trial Court, without more, demanded that vigilance be exercised by the Trial Court, but that vigilance was not exercised. The fact is that the Trial Court's year-before-trial competency determination was already an inherently tenuous one. The Trial Court premised its competency determination, against strong evidence of incompetence, solely on Dr. Holcomb's opinion that Mr. Lyons could only be minimally competent, and then only if certain conditions were met, those being correct medication and continued hospitalization. Thus, the very evidence of minimal, conditional competence upon which the Trial Court premised its competency determination already alerted the Court to the necessity for followup monitoring and reassessment. That Trial Counsel could have been more insistent, or even contemptuous, in their urgings that

the Trial Court reconsider the matter, necessarily and improperly presumes that the Trial Court did not understand the plain import of the evidence already before it. What is more fair to say is that, built into foundation of the Trial Court's original competency determination was an inherent, bona fide doubt about Mr. Lyons' continued competence. Because that bona fide doubt already existed, it was already the duty of the Trial Court to keep its finger on the pulse of the matter. ***Pate v. Robinson***, 385; ***Reynolds v. Norris***, 800-801. Thus, the fault for the Trial Court's failure to discharge this responsibility belonged to the Trial Court alone.

CONCLUSION

WHEREFORE, in light of the foregoing, and in light of the premises set forth in his Appellant's Brief, Mr. Lyons prays that this Honorable Court reverse the judgment of the Motion Court, with directions that the Trial Court sustain the request for Order *nunc pro tunc*, and thereby permit a full hearing upon Mr. Lyons' incompetence at the time of trial, and a finding of Mr. Lyons' incompetence at time of trial. Mr. Lyons

additionally prays for any other and further relief
which the Court may deem just and proper under the
circumstances.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I do hereby certify that the foregoing has been prepared in WordPerfect 9 format, which reports a content of 3,578 words. A diskette containing this brief has been provided, and has been scanned for viruses with none having been detected.

FREDERICK A. DUCHARDT, JR.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was mailed this 12th day of January, 2004 to the following

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